

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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Court of Appeals, District of Columbia

APRIL TERM, 1903.

No. 1306

215

No. 12, SPECIAL CALENDAR.

**GEORGE A. MCGOWAN, ON BEHALF OF EDWARD JOHN
SON, APPELLANT,**

vs.

**WILLIAM H. MOODY, SECRETARY OF THE NAVY OF
THE UNITED STATES.**

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED APRIL 20, 1903.

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INDEX.

	Original.	Print.
Caption	<i>a</i>	1
Petition for writ of <i>habeas corpus</i>	1	1
General order No. 30.	6	4
Rule to show cause.	7	4
Return to rule.	8	5
Rule discharged, petition dismissed, appeal, and penalty of bond fixed.	9	6
Memorandum: Appeal bond filed.	9	6
Opinion of Chief Justice Bingham.	10	6
Clerk's certificate	19	10

In the Court of Appeals of the District of Columbia.

GEORGE A. MCGOWAN, on Behalf of EDWARD JOHNSON, }
Appellant, } No. 1306.
vs. }
WM. H. MOODY, Sec'y of the Navy. }

a Supreme Court of the District of Columbia.

In re the Petition of GEORGE A. MCGOWAN, on Behalf of EDWARD JOHNSON, for a Writ of *Habeas Corpus*. No. 339. *Habeas Corpus*.

UNITED STATES OF AMERICA, }
District of Columbia, } ss.:

Be it remembered, that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:—

1 *Petition.*

Filed January 10, 1903.

In the Supreme Court of the District of Columbia.

In re the Petition of GEORGE A. MCGOWAN, on Behalf of EDWARD JOHNSON, for a Writ of *Habeas Corpus*. *Habeas Corpus*. No. 339.

To the supreme court of the District of Columbia:

The petition of George A. McGowan on behalf of Edward Johnson respectfully shows as follows:

1. Your petitioner is a citizen of the State of California and makes and files this petition on behalf of the said Edward Johnson, whereto, on account of the difficulties and delays necessarily incident to the confinement hereinafter mentioned, your petitioner has been duly authorized and requested by said Johnson.

2. On information and belief, said Johnson is imprisoned and restrained of his liberty in a jail at or near the town of Agana in the island of Guam situated in the Marianas or the Ladrões, which island by the late treaty of Paris, proclaimed by the President of the United States on the eleventh day of April, A. D. 1899, has been ceded to the United States and has thereby ceased to be foreign

thereto. Said Johnson is so imprisoned and restrained by the agents and subordinates of William H. Moody, Secretary of the Navy, and is within the control of said Secretary of the Navy, and within
2 the custody of some one, unknown to your petitioner, exercising authority under and under the directions and orders of said Secretary of the Navy.

3. On information and belief, said Johnson has not been committed and is not detained by virtue of any judgment, decree, order, or process issued by any court or judge of the United States or by any court or judge of any State or Territory of the United States or by any court-martial in any case where such courts or judges have jurisdiction under any of the laws or treaties of the United States or the laws of any State or Territory or have acquired jurisdiction by the commencement of legal proceedings in such court or before such judge; nor is the said Johnson committed or detained by virtue of the final judgment or decree or sentence of any competent tribunal of a civil or criminal jurisdiction or by that of any court-martial, or by virtue of any execution or other process issued upon such judgment, decree, order, or sentence.

4. On information and belief, the pretended cause of imprisonment, detention, or restraint of said Johnson is that said Johnson was at and before the times hereinafter mentioned an enlisted man in the Marine Corps of the United States, serving in barracks in said island, whither he had been involuntarily ordered and sent by his lawful superior officers, and on or about the seventh day of May, A. D. 1901, the said Johnson was arrested by military authority on a charge of larceny or theft, alleged to have been committed at said barracks, of a box of clothing and about three hundred dollars in Mexican currency from one
3 Clarence J. Hoskins, also an enlisted man in the Marine Corps of the United States, and kept in confinement at said quarters until on or about the seventeenth day of May, A. D. 1901, when, pursuant to an alleged order, entitled General Order No. 30, a copy of which and translation whereof are hereto annexed, marked A and B respectively, issued by the military governor of said island, one Seaton Schroeder, a commander in the Navy of the United States, he was turned over by said military authority to the alleged civil authorities of the island, these latter being officers of the Navy or Marine Corps of the United States, or appointees of said governor or his predecessor, also an officer in the Navy of the United States, and on or about the third day of October, A. D. 1901, in the meantime not having had a hearing, said Johnson was brought before an alleged court, consisting of an ensign in the Navy of the United States, one Alfred W. Pressy, and after a pretended trial which was conducted in the Spanish language which was not understood by said Johnson, the said authorities refusing to furnish the said Johnson with an interpreter, although by him requested so to do, the interrogatories put to said Johnson, however being in the English language, said alleged court assumed to sentence said Johnson to six years' imprisonment to

begin on the twenty-first day of November, A. D. 1901, which alleged sentence he is still serving out, confined as aforesaid. During said pretended trial said Johnson was not permitted by said authorities to be present, except for the purpose of answering interrogatories propounded to him, nor to hear the testimony adduced against him, nor to be confronted by the witnesses against him. At said pretended trial said Johnson entered a plea to the jurisdiction
4 of the alleged court, claiming that he should be tried by a court-martial of the Navy of the United States, but said plea was overruled and said alleged sentence imposed.

5. Your petitioner avers that said alleged court and the said pretended trial were as to said Johnson entirely and utterly without any jurisdiction whatever, and said alleged tribunal was totally incompetent to try *to or* sentence said Johnson or to render or impose any judgment or sentence whatever against him.

6. The articles for the government of the Navy of the United States provide that all offenses committed by persons belonging to the Navy of the United States while on shore shall be punished in the same manner as if they had been committed at sea; and that the offense described in said article as theft, meaning thereby larceny, may be punished as a court-martial may adjudge. The Navy Department, however, in a general order issued on the twenty-fifth day of May, A. D. 1896, published a limitation to the punishment of said offense, in time of peace, to be, for enlisted men, confinement for two years and dishonorable discharge, said limitation having been approved by the President of the United States in accordance with an act of the Congress of the United States, approved on the twenty-

for two years and dishonorable discharge, said limitation having been approved by the President of the United States in accordance with an act of the Congress of the United States, approved on the twenty-seventh day of February, A. D. 1895. The times of the alleged committal of said charged offense and said alleged or pretended trial and sentence were in time of peace, and said articles, above referred to, and the limitation aforesaid were in full force and virtue at said times.

5 Wherefore your petitioner respectfully prays that a writ of *habeas corpus* may issue directed to William H. Moody, Secretary of the Navy of the United States, commanding him to produce the said Edward Johnson before this honorable court at the city of Washington at such time as the court may direct; and that the said William H. Moody then and there show the cause of the detention and confinement of the said Edward Johnson, to the end that the said Edward Johnson may be discharged from custody.

GEORGE A. MCGOWAN.

FRANKLIN H. MACKEY,

WALTER D. DAVIDGE,

Attorneys for Petitioner.

STATE OF CALIFORNIA, }
City and County of San Francisco, } ss :

I do solemnly swear that I have read the petition by me subscribed, and know the contents thereof, and that the facts therein stated upon

my personal knowledge are true, and those stated upon information and belief, I believe to be true.

GEORGE A. MCGOWAN.

Subscribed and sworn to before — this 16th day of December, A. D. 1902.

E. H. HEACOCK,
*U. S. Commissioner for the Northern District
of California, at San Francisco.*

(*Translation of A.*)

GOVERNMENT HOUSE,
AGANA, ISLE OF GUAM, *May 7, 1901.*

General Order }
No. 30. }

1. For the present I order and command that power be vested in the courts of general jurisdiction to hear and determine those offenses which constitute crimes or misdemeanors committed by individuals subject to the special jurisdiction of War or Navy, provided that said crimes or misdemeanors correspond to the kind of those called "common," and which because of their nature and special circumstances do not fall exclusively within the jurisdiction vested in the authorities of War or Navy.

2. Every law or part of law which is inconsistent with this order at present is repealed.

SEATON SCHROEDER,
Of the Navy of the United States, Governor.

Order on Secretary of Navy to Show Cause, &c.

Filed January 10, 1903.

In the Supreme Court of the District of Columbia.

In re the Petition of GEORGE A. MCGOWAN, on Behalf of EDWARD JOHNSON, for a Writ of *Habeas Corpus*. *Habeas Corpus*. No. 339.

On consideration of the petition of George A. McGowan on behalf of Edward Johnson, herein this day filed, and on motion of Franklin H. Mackey and Walter D. Davidge, said petitioner's attorneys, it is this tenth day of January, A. D. 1903, ordered that William H. Moody, Secretary of the Navy, show cause on or before the 23rd day of January, A. D. 1903, why the writ of *habeas corpus* should not issue as prayed in said petition :

Provided, a copy of said petition and a copy of this order be served

on said William H. Moody, on or before the fourteenth day of January, A. D. 1903.

E. F. BINGHAM,
Chief Justice Supreme Court D. C.

Marshal's Return.

Served copy of within order and copy of the petition in this cause on William H. Moody, Secretary of the Navy, January 10, 1903.

AULICK PALMER, *Marshal*.
B.

8

Return of Secretary of the Navy, &c.

Filed January 26, 1903.

In the Supreme Court of the District of Columbia.

In re the Petition of GEORGE A. MCGOWAN, on Behalf of EDWARD JOHNSON. *Habeas Corpus*. No. 339.

Now comes William H. Moody, Secretary of the Navy, and suggesting to the court that it appears in and by the petition filed herein that Edward Johnson, in whose behalf the said petition is filed, is not committed, detained, confined or restrained from his lawful liberty within the District of Columbia, prays the judgment of the court whether he shall be required to show cause in answer to the rule heretofore laid upon him.

CHAS. H. DARLING,
Acting Secretary.

MORGAN H. BEACH,
U. S. Attorney, D. C.

DISTRICT OF COLUMBIA, ss:

I, Chas. H. Darling, acting Secretary of the Navy, on oath say that I have read the foregoing return by me subscribed, and know the contents thereof; that the facts therein stated of my own knowledge are true, and that those stated upon information and belief I believe to be true.

CHAS. H. DARLING.

Subscribed and sworn to before me, this 26th day of January, A. D. 1903.

[SEAL.]

EDWIN P. HANNA,
Notary Public.

Order Discharging Rule ; Appeal, &c.

Filed March 7, 1903.

Supreme Court of the District of Columbia.

In re EDWARD JOHNSON. *Habeas Corpus.* No. 339.

This cause coming on to be heard upon the petition for a writ of *habeas corpus*, the rule to show cause, and the answer of the Secretary of the Navy thereto, after argument of counsel and consideration of the cause, it is ordered that the rule to show cause be discharged and the petition be, and hereby is, dismissed at petitioner's costs.

E. F. BINGHAM,
Chief Justice.

Appeal noted by petitioner and bond fixed in penalty of \$50.00.

E. F. BINGHAM,
Chief Justice.

Memorandum.

March 13, 1903.—Appeal bond—filed.

Oral Opinion of Justice Bingham.

Filed March 17, 1903.

In the Supreme Court of the District of Columbia.

In the Matter of EDWARD JOHNSON. No. 339. *Habeas Corpus.*

MARCH 7, 1903.

This is a petition filed by one George A. McGowan asking for the writ of *habeas corpus* to compel the Secretary of the Navy to produce the body of one Edward Johnson before this court. It is alleged in the petition, on information and belief, that Johnson is imprisoned and restrained of his liberty in the island of Guam by the agents and subordinates of the Secretary of the Navy, and that said Johnson is within the control of said Secretary of the Navy and within the custody of some one unknown to the petitioner exercising authority under and under directions and orders of said Secretary of the Navy.

The further statement is made that Johnson was enlisted in the United States as a member of the Marine Corps, and that the company to which he was attached as such marine was ordered by the Secretary of the Navy to the island of Guam; that the island of Guam is under the jurisdiction of the Secretary of the Navy; and that the commander of the naval forces there has been designated by the Secretary of the Navy as the governor of the island; that the

petitioner was arrested and charged with having committed larceny—grand larceny I take it to be; that the naval governor of Guam ordered that he be tried for such offence by the alleged civil authorities of the island; that he was tried before an alleged civil court, consisting of an ensign in the navy, who had been appointed judge by said governor, and some irregularities are mentioned as having occurred in the trial—for instance, that the Spanish language was used in the trial; that he was not allowed to be present when witnesses were examined, and that the testimony was not translated so that he could understand it, and that he was not tried in accordance with the law prevailing in the United States or any of its territories. There are other allegations in the petition which it is unnecessary to mention, in view of the grounds upon which I rest my decision in the matter.

Upon a rule to show cause why the writ should not issue, the Secretary of the Navy objects to the jurisdiction of this court because it appears from the petition that said Johnson is not restrained from his liberty within the District of Columbia, and he prays the judgment of the court whether he shall be required to answer the rule.

This raises the question of the power of this court in reference to a *habeas corpus* proceeding.

Section 1143 of the Code now in force, and in force at the time of this alleged imprisonment, whether all the time or not, certainly in force at the time of the filing of this petition, provides as follows:

12 "Any person committed, detained, confined, or restrained from his lawful liberty *within the District*, under any color or pretense whatever, or any person in his or her behalf, may apply by petition to the supreme court of the District, or any justice thereof, for a writ of *habeas corpus*, to the end that, the cause of such commitment, detainer, confinement, or restraint may be inquired into; and the court or the justice applied to, if the facts set forth in the petition make a *prima facie* case, shall forthwith grant such writ, directed to the officer or other person in whose custody or keeping the party so detained shall be, returnable forthwith before said court or justice."

So far as we may be supposed to have any grant of power from this statute, it is apparent that we have none in this case, it being alleged in the petition that the party is confined in a far distant island in the Pacific ocean, and certainly not within the District of Columbia.

It is claimed on behalf of the petitioner that we have the power because it is alleged in the petition that the Secretary of the Navy has control of this person who is alleged to be imprisoned in Guam, and that he has the power to order his release, and that this court having jurisdiction of the Secretary of the Navy, may order him to make such a release.

It is claimed that we have this power by virtue of the act of Congress of 1801 accepting the cession from Maryland of the present District of Columbia, which provided that all the statutes of Maryland up to that time, and the statutes of Great Britain passed before

the independence of the United States and which had been adopted by the State of Maryland, and also the common law as it
13 has existed in England and had been adopted in the State of Maryland, should be in force in the District of Columbia, and that by virtue of the act of Maryland of 1798, which has been recognized as in force in this District by our courts in at least one case, the common law right to issue the writ of *habeas corpus* on the part of our judges and courts has been maintained and transmitted to the District of Columbia; and that we have jurisdiction, not by virtue of any statute enacted by Congress for the District since the District was ceded to the United States, nor by virtue of any statute of Maryland, but, notwithstanding these statutes, that we have jurisdiction by virtue of the common law, which, it is claimed, invested any judge of any court of record in England with power to issue the writ for the release of any person in any part of England, irrespective of where the person might be.

The only observation to be made in relation to that is that at common law, in olden times, all writs of this character purported to be issued from Westminster and they ran to any part of England, and therefore the general authority was invested in the Court of King's Bench sitting at Westminster; and where the court did issue the writ it was upon its face a writ issuing out of Westminster and under the authority of the King's Bench.

And it is to be remembered in a matter of this sort, that our courts spring from an entirely different source from the courts of England, our relations in this country and in England being entirely different in both State and Federal courts. The power in this country to issue the writ depends upon statutes. This is strictly so with regard to
Federal courts.

14 We have any number of cases to the effect, decisions by Federal judges that they have no power to issue writs of *habeas corpus* except as authorized by the acts of Congress; and that act of Congress which prevails now, and which has prevailed I think always, has had a provision that any Federal judge may issue writs of *habeas corpus* to inquire into the imprisonment of any person confined within the territorial limits of his jurisdiction—if a district judge, a person confined in the limits of the district; if a circuit judge he may issue the writ on behalf of any person confined within the limits of the circuit; the judges of the Supreme Court of the United States may issue the writ on behalf of any person confined in any part of the United States; they are the only judges, and that is the only court, which has jurisdiction co-extensive with the limits of the United States.

We are cited to a case in 5th Cranch Circuit Court Reports, United States v. Davis, p. 622, where the party came into court and filed a petition asking for the production of certain persons who were held as slaves, but were in reality free persons; it appears from the report that the writ issued to the party who was claimed to wrongfully hold them, and that he answered that he had no control over them, that before the issuing of the writ of *habeas corpus* these per-

sons had been taken to the State of Maryland without any purpose on his part to evade the law; it seems, however, that that was not taken as strictly true, that some examination was made, and counsel filed a motion to punish the respondent for contempt, alleging that he had some apprehension that the writ might be issued and had sent the persons to Maryland to get them out of
 15 the jurisdiction of the court. That what passed in that court was upon the proceeding in contempt is manifest. The court, having heard the matter, ordered that the respondent should be confined until such time as he brought the persons under his control into court; that that order was the only order which could be made; and that the respondent was held in imprisonment until he did produce the parties—it is not shown exactly that he did produce the parties—but they came into court and proved that they were free persons and were discharged by the court as free persons, in accordance with some law prevailing at the time; that being accomplished, the respondent was given his liberty. It does not appear that there was any question made as to the authority of the court to issue the writ of *habeas corpus*. It was certainly competent for the court, if they believed from the evidence before them that the respondent, in anticipation of the writ of *habeas corpus* for the purpose of depriving the court of its power to compel the production of these alleged slaves, had removed them from the district, to punish him for contempt, and to order his confinement as in contempt. It does not appear that the court had any occasion to call upon any other resource for power to deal with the respondent in that case.

A similar case is shown to have occurred in Iowa, *Rivers v. Mitchell*, 57 Iowa, 193, in which probably there was about the same state of facts. The party who was alleged to have spirited away the persons for whom the petition was filed, was held in contempt for not producing the persons, and he ultimately did produce them.

16 A case of similar character occurred in Michigan, in which the court was divided. *In re Jackson*, 14 Mich., 417. Judge Campbell, one of the eminent judges of Michigan, perhaps as eminent as Judge Cooley so far as his reputation as a judge is concerned, delivered an opinion to the effect that the court in Michigan had no power to order the release of a person who was confined in Canada. Judge Cooley dissented from that, but distinctly stated in his opinion that he would not hold that the court had such power unless it were clearly shown that such person so confined in Canada was a citizen of the State of Michigan, and was held in confinement by another citizen of Michigan. It is not alleged in the petition here that this person Johnson is a citizen of the District of Columbia or of the United States. It must be presumed, I suppose, that the Secretary of the Navy is a citizen of the United States.

Some other decisions are quoted on the brief of counsel for petitioner, but I think that I have named all the cases which can be considered as any authority that a court has jurisdiction under the circumstances and in the situation pointed out by the petitioner.

There are some cases where the claim is made that where the court has jurisdiction of the party who is alleged to have the control over the prisoner and power to release him, the court may order that person to release the prisoner, but there are several other cases to which my attention has been called, where it is stated that the writ must be directed to the person who is the immediate jailer or party confining the party claiming to be imprisoned, and I think that is the general understanding. For instance, a party is

17 sent to jail by a court, and it is alleged that the court had no jurisdiction to try him for the offense which he was supposed to have committed and upon which alleged trial the court sent the party to jail—in all cases of that sort it is held that the writ should be sent to the jailer, or the party having power and exercising actual power of imprisonment, and who can unlock the doors of the prison and set him free, and the writ should not be directed to the party who is alleged to have issued the order, even though it be that the order issued illegally, and that the prisoner is detained by virtue of such illegal order. I think that is quite well settled.

Now, the only answer to that is that the island being in an unsettled condition, without any civil authorities and without any courts of a legal character, except purely military courts, the petitioner is without remedy unless he can be reached through the Secretary of the Navy. The answer to that is that it is unfortunate for the prisoner. But his remedy lies with Congress, or with the President or Secretary of the Navy.

That is as far as I need to go in disposing of this case. The Secretary of the Navy has said that in his judgment this court has no jurisdiction to determine whether this party is lawfully imprisoned or not, and so far as I am able to understand this case, upon the authorities which have been produced, the claim of the Secretary of the Navy in relation to this matter is correct.

Counsel for the petitioner have presented the case with a great deal of ability, and as forcibly perhaps as could be presented by any member of the bar, but I am unable to see that I have juris-
18 diction to do what counsel would like to have me do.

This matter is appealable, and I shall be very glad to have the case go up and be settled by higher authority.

E. F. BINGHAM.

19 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, } ss :
District of Columbia,

I, John R. Young, clerk of the supreme court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 18, inclusive, to be a true and correct transcript of the record, as per rule 5 of the Court of Appeals of the District of Columbia, in cause No. 339, *habeas corpus, in re*: the petition of George A. McGowan

on behalf of Edward Johnson for a writ of *habeas corpus*, as the same remains upon the files and of record in said court.

In testimony whereof, I hereunto subscribe
Seal Supreme Court my name and affix the seal of said court, at
of the District of the city of Washington, in said District, this
Columbia. 26th day of March, A. D. 1903.

JOHN R. YOUNG, *Clerk*.

Endorsed on cover: District of Columbia supreme court. No. 1306. George A. McGowan, on behalf of Edward Johnson, appellant, vs. Wm. H. Moody, Sec'y of the Navy. Court of Appeals, District of Columbia. Filed Apr. 20, 1903. Robert Willett, clerk.